Noteworthy Decision Summary

Decision: WCAT-2005-05843 **Panel**: Randy Lane **Decision Date:** October 31, 2005

Note: This decision was reconsidered and voided by the Chair of WCAT in *WCAT-2006-03922*. In light of *Cowburn v. Worker's Compensation Board of British Columbia* (2006 BCSC 722) and the retroactive amendment of item #1.03(b)(4) of the *Rehabilitation Services and Claims Manual, Volumes I and II*, the Chair found that the decision must be set aside because it was tainted by the application of a patently unreasonable policy, resulting in an error of law going to jurisdiction.

This decision remains noteworthy as an example of the full process whereby a policy of the board of directors of the Workers Compensation Board is referred to the chair under section 251 of the *Workers Compensation Act*.

Recurrence of Disability – Transition Provisions – Application of Policy that Board of Directors Determined Must be Applied – Deterioration of Occupational Disease – Period of Payment – Whether "Date of Injury" includes Date of Recurrence of Injury – Policy Item #1.00(4) (#1.03(b)(4)) of Rehabilitation Services and Claims Manual, Volume I and II – Sections 23.1 and 251(8) of Workers Compensation Act

- Pursuant to section 251(8) of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) does not have the authority to refuse to apply a policy of the Workers' Compensation Board (Board) where the Board of Directors of the Board has decided that the policy is not patently unreasonable and must be applied.

- Policy item #1.00(4) of the *Rehabilitation Services and Claims Manual, Volume I and II* (RSCM I and II), now item #1.03(b)(4), is broad enough to apply to an anticipated deterioration in the permanent effects of an injury or an occupational disease.

- The expression "date of injury", as used in section 23.1 of the Act, does not include the date of recurrence of an injury.

In this case, the worker was a retired ironworker. In 2001, and after he retired, the Board accepted the worker's claim for several occupational diseases relating to asbestos induced respiratory conditions, and awarded him a permanent disability award of 20% of total disability. In early 2002 the Board advised the worker, then 71 years old, that his award would be reassessed in one year. On June 30, 2002, prior to the planned assessment, the Act was amended by the *Workers Compensation Amendment Act, 2002.* Section 23.1 was added and provides, with certain exceptions not applicable here, that if a worker is 63 years or older on the date of injury, compensation is payable for up to two years after the date of injury. For the purposes of the worker's claim, the Board identified the date of injury to be in September of 2000. As a result of section 23.1, the Board determined that a formal reassessment was not required as the worker was 63 years or older on the date of injury and more than two years had passed since that date, and thus no additional permanent disability benefits were payable. The worker's existing benefits paid under the former provisions of the Act would continue to be paid. The Board's decision was upheld by the Workers' Compensation Review Division.

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The Board applied section 23.1 to the worker's claim because section 35.1(8) provides that if a worker has, on or after June 30, 2002, a recurrence of disability that results from an injury that occurred before June 30, 2002, the Board must determine compensation for the recurrence based on the amended Act. The Board determined that the worker had a recurrence of disability after June 30, 2002, because item #1.00(4) of the RSCM I and II provides, in part, that a recurrence includes "…any permanent changes in the nature and degree of the worker's permanent disability."

On appeal, the WCAT panel considered that item #1.00(4) should not be applied on the grounds that the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. Pursuant to section 251(2), the WCAT panel referred the issue to the chair of WCAT who determined that the policy was patently unreasonable (see *WCAT-2005-01710*). Subsequently, the Board of Directors of the Board, pursuant to section 251(6), determined that the policy was not patently unreasonable and must be applied by WCAT.
On the issue of whether WCAT must apply item #1.00(4), the worker argued that WCAT's applying of a policy it considered to be patently unreasonable "… would be in violation of the principles of natural justice and procedural fairness, which include requirements of independence and impartiality." The worker argued that "[b]y virtue of s. 251(8) of the Act, the WCAT can have neither objective nor perceived independence." The worker further argued that if it becomes a question of who should be forced into the court process, the onus should be placed on the Board not an injured worker with a terminal illness contracted through his employment. The panel determined that section 251(8) requires WCAT to apply item #1.00(4), regardless of the observations that the panel may have made about it in its referral to the chair of WCAT, and regardless of the determination by the chair of WCAT. The Legislature would have understood that the terms of section 251(8) exposed WCAT to the possibility that it would be required to apply a policy that it may have questioned.

On the issue of whether, in this case, the worker suffered a recurrence, the worker argued that no recurrence occurs when the deterioration in a permanent condition is expected, as it was for his terminal occupational disease, but only occurs in cases where the deterioration results from an unforeseen circumstance. He argued that his condition thus never plateaued. The panel found that the worker did suffer from a recurrence. Item #1.00(4) applied because the policy language is broad enough to apply to a deterioration in the permanent effects of an injury or an occupational disease.

On the issue of whether the expression "date of injury" in section 23.1 must be read as including the date of a recurrence of an injury, the WCAT panel found that the date of injury does not include the date of a recurrence of an injury. If it did, a worker whose injury recurs when the worker is 63 years or older would be entitled to an additional period of benefits every time a permanent condition worsens, a result contrary to the intent of section 23.1, which is to limit the duration of permanent disability benefits.

In the result, the panel upheld the Board's decision and found that the worker is not entitled to a reassessment of his permanent disability award. Any deterioration in his permanent disability after June 30, 2002 would involve a recurrence of his disability and would be subject to the provisions of section 23.1 and he would not be entitled to any additional permanent disability benefits.

This decision is void. See *WCAT-2006-03922*, dated October 17, 2006.

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WCAT Decision Date: October 31, 2005
Panel: Randy Lane, Vice Chair

Introduction

In February 2001 the worker, a former ironworker, submitted a claim for asbestos-related pleural plaques, fibrosis, and rounded atelectasis (incomplete expansion of the lung). He was born in November 1930 and had retired in 1989, although information on file suggests that he was in receipt of a union disability pension from January 1987 onwards. The file information does not suggest that the disability pension was for asbestos-related impairment.

By decision of May 9, 2001 the Workers' Compensation Board (Board) awarded the worker a pension of 20% of total disability effective September 29, 2000. That effective date was chosen because, while in hospital on that date for heart-related problems, the worker underwent x-rays which revealed pleural plaques.

The worker was assessed at a March 26, 2002 follow-up. By letter of April 11, 2002 the Board advised that no change would be made in his award, but he would be reassessed in one year.

By letter of February 28, 2003 a disability awards officer noted that the worker was scheduled to be reassessed regarding his permanent condition. The officer noted amendments to the *Workers Compensation Act* (Act) effective June 30, 2002 which indicated that compensation for permanent disability was not payable beyond the date of the worker's retirement. He indicated that the worker was considered to be retired and, as a result, a formal reassessment was not required, as no additional permanent disability benefits were payable. The worker was advised that his existing benefits paid under the former provisions of the Act would continue to be paid.

By decision of October 21, 2003 (*Review Decision #3773*) a review officer with the Review Division of the Board confirmed the February 28, 2003 decision. (Review officers' decisions may be viewed on the Internet at the Board's website at www.worksafebc.com.)

The worker appealed the October 21, 2003 decision to the Workers' Compensation Appeal Tribunal (WCAT). His representative provided a February 18, 2004 submission which included her argument that Board policy was not capable of being supported by

the legislation. The office of the Employers' Advisers was notified of the appeal, but that office did not file a submission.

In my June 25, 2004 memorandum to the chair of WCAT, I documented concerns as to the validity of item #1.00(4) of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

In her April 7, 2005 decision (*WCAT Decision #2005-01710*) the chair of WCAT determined that policy item #1.00(4) of the RSCM I and RSCM II (which is now item #1.03(b)(4)) was patently unreasonable. Pursuant to subsection 251(5) of the Act, the chair referred the matter to the Board's board of directors. (The chair's decision may be viewed on the Internet at WCAT's website at http://www.wcat.bc.ca.) The worker's appeal was suspended.

In its August 11, 2005 decision the Board's board of directors determined that the policy referred by the chair of WCAT was not patently unreasonable and that WCAT must apply the policy. (The board of directors' decision may be viewed on the Internet at the Board's website.)

By letter of September 28, 2005 the worker provided a further submission. An employers' adviser provided a September 29, 2005 submission. The worker was provided with an opportunity to respond to the September 29, 2005 submission, but no response was received by the October 25, 2005 due date.

By letter of January 29, 2004 the worker was advised that the appeal would proceed by way of written submissions. That decision does not bind me if I consider that an oral hearing is necessary. I have considered the rule regarding the holding of an oral hearing set out in item #8.90 in the *WCAT Manual of Rules of Practice and Procedure* and the other criteria set out in that item. I consider a fair and thorough decision may be reached on this appeal without holding an oral hearing.

Issue(s)

At issue is whether the worker is entitled to a reassessment of his permanent partial disability pension award for his asbestos-related respiratory condition.

Jurisdiction

WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the Act). It is not bound by legal precedent (subsection 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but, in so doing, it must apply a policy of the board of directors of the Board that is applicable in the case.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

I consider that a review of the review officer's decision is sufficient to put the issue on appeal in context. The review officer noted amendments to the Act in 2002 as a result of the *Workers Compensation Amendment Act, 2002* (the Amendment Act) which came into force on June 30, 2002 (the transition date). He also noted item #1.00 of the RSCM II. He observed that, owing to the language of item #1.00(4), a recurrence of a disability after the transition date included a permanent change in the nature and degree of a permanent disability. Therefore, any decision relating to additional benefits would be subject to the terms of the Act as amended by the Amendment Act.

The review officer noted the terms of section 23.1 of the Act, concerning the duration of permanent partial disability benefits paid under section 23:

> Compensation payable under section 22 (1), 23 (1) or (3), 29 (1) or 30 (1) may be paid to a worker, only
>
> (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:
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> (i) the date the worker reaches 65 years of age;
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> (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and
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> (b) if the worker is 63 years of age or older on the date of the injury, until the later of the following:
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> (i) 2 years after the date of the injury;
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> (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

[all quotations in this decision are reproduced as written, save for changes noted]

The review officer provided the following analysis in determining that the worker would not be entitled to any additional permanent disability benefits as a result of a recurrence:

> The worker advised the Board that he retired in 1989. There is no evidence submitted to indicate that the worker is no longer retired. The provisions of section 23.1 would apply, such that any recurrence of disability would only generate benefits for up to two years after the date of the injury.
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> The date of the injury is September 29, 2000. Therefore, by the spring of 2003, the worker would have been outside of the two-year window referenced under section 23.1(b)(i). Nor does section 23.1(b)(ii) apply, as the worker had already retired. The worker would therefore not have any eligibility to any additional benefits, should he have sustained a recurrence of disability.

The review officer determined that the terms of section 32 of the Act did not assist the worker:

> Section 32 also provides direction, where there is a recurrence of disability more than three years from the original injury. Section 32(1) applies to temporary disability benefits and allows the Board to calculate the compensation for this temporary recurrence as if it were the happening of the injury. The worker's representative submits that the effect of this subsection would be to allow, in essence, a new "date of injury" to be established for the claim, leading to new eligibility under section 23.1.
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> I find, however, that section 32(1) is not applicable for two reasons. This section applies to temporary disability benefits, and the benefits under this review pertain to permanent disability benefits. Furthermore, this section requires a "lapse of three years following the occurrence of the injury". The worker's date of injury is less than three ago.
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> Section 32(3) provides direction with respect to an increase in the degree of permanent disability more than three years after the injury. This would not yet apply under the circumstances of this review, as the potential recurrence of disability would not be more than three years after the date of injury. Even if this did apply, section 32(3) only applies to the manner in determining the worker's average earnings. It does not apply to, nor override, the specific direction for the duration of benefits established under section 23.1.

The review officer did not consider that subsection 35(4) of the Act assisted the worker:

> As an alternative, the worker's representative suggests that, by virtue of being retired, the applicant is a pensioner, not a worker. The representative references section 35(4), which uses both of these terms. I find that section 35(4) has a very narrow application, and applies where the worker or pensioner has benefits owing, but dies before their payment.
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> At the time of the acceptance of this claim, the worker was retired and not a worker. Section 6 of the Act, under which this claim was accepted, authorizes the payment of benefits where "a worker suffers from an occupational disease". Other provisions of the Act, including section 23, authorize payments to "the injured worker". If the representative's interpretation were to apply, no benefits would have been payable in the first instance, as the applicant was not a worker at the time he developed the occupational disease.

Reasons and Findings

The February 28, 2003 decision was issued after the Amendment Act came into force on June 30, 2002.

Section 35.1(8) of the Act provides that "If a worker has, on or after the transition date, a recurrence of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the recurrence based on this Act, as amended by the *Workers Compensation Amendment Act, 2002*." I consider that the phrase "an injury" would include an occupational disease.

Item #1.00(4) of the RSCM II, as it read as of February 28, 2003, provided guidance as to the meaning of "recurrence of a disability." It indicated that "recurrence" included a claim that was reopened as a result of "any permanent changes in the nature and degree of a worker's permanent disability." It provided the following example of a recurrence:

- A worker is in receipt of a permanent disability award and the disability subsequently worsens. The claim is re-opened to provide compensation for a new period of temporary disability and/or an increase in entitlement for the permanent disability award.

That definition of recurrence is key to the appeal before me because of the language of section 23.1 of the Act reproduced above.

The review officer considered that any worsening of the worker's permanent disability would involve a recurrence with the result that any additional permanent disability would be evaluated under the amended Act. The review officer considered that assessment under the amended Act would result in a conclusion that the worker had no entitlement to additional benefits because the worker was retired and over age 63 at the date of injury in 2000; by the spring of 2003, the worker was outside the two-year post-injury period found in paragraph 23.1(b)(i).

As noted earlier in this decision, the Board's board of directors determined that WCAT was required to apply Board policy regarding the definition of a recurrence of a disability. That requirement flows from subsections 251(6) and 251(8) of the Act which provide that after a referral of a policy by the chair of WCAT, the Board's board of directors must determine whether WCAT may refuse to apply the policy and that WCAT is bound by the board of directors' determination. Thus, I must render my decision on the basis that any deterioration after June 30, 2002 in the worker's permanent partial disability is a recurrence of his disability with the result that the new provisions in the Act are applicable to any determination as to his entitlement.

In considering the requirement that I must apply the Board's policy, I have taken into account the worker's arguments that WCAT's applying of a policy it considered to be patently unreasonable "… would be in violation of the principles of natural justice and procedural fairness, which include requirements of independence and impartiality." The worker expands on his argument by contending that WCAT's application of the policy would "…erode workers' rights and make a mockery of the independence of the appeal tribunal." He submits that "[b]y virtue of s. 251(8) of the *Act*, the WCAT can have neither objective nor perceived independence." He contends that the workers' compensation system should provide for just and speedy resolution of disputes without undue resort to complex and lengthy court processes. It is submitted that if it becomes a question of who should be forced into the court process, the onus should be placed on the Board, as the worker is a 74-year-old man seriously struggling to deal with the debilitating effects of a terminal disease contracted through his employment.

The submission on behalf of the worker concludes with the following comments

> If WCAT applies the impugned policy at item #1.03(b)(4) to the facts of this case, WCAT is, in effect, allowing the Board of Directors to decide this appeal. [The worker] urges WCAT to maintain its independence from the Board and render a decision that is defensible in light of the findings of the Chair in WCAT-2005-01710. [The worker] urges WCAT to maintain its integrity by not making a decision that can only be considered irrational, unreasonable and absurd in light of its previous findings.

The employers' adviser submits that WCAT has a statutory obligation to apply the policies of the board of directors. He notes that just as the Board is required to implement a WCAT decision (with which an employer may disagree), the Act stipulates that WCAT must now apply a policy as directed by the board of directors. He submits that the worker still takes the position that the policy in question is patently unreasonable and is asking WCAT to exercise its independence as an appeal tribunal. He observes that the issue of the validity and lawfulness of this policy is moot, given the decision of the board of directors. WCAT must apply the policy as directed by the board of directors. He has difficulty understanding how WCAT, by implementing the decision of the board of directors, would affect its integrity or independence as an appeal tribunal. To accept the arguments of the worker's representative would constitute a clear violation of subsection 251(8). WCAT is not the forum for addressing any disagreement with the determination of the board of directors regarding the policy issue or the wording of subsection 251(8). Other remedies are available.

I decline the request of the worker's representative to ignore the terms of the legislation. I consider that it would be irresponsible for me to defy the terms of subsection 251(8). Regardless of the observations that I may have made about item #1.00(4) in my memorandum, and regardless of the determination by the chair of WCAT in *WCAT #2005-01710*, WCAT is required to apply that policy. The Legislature would have understood that the terms of subsection 251(8) exposed WCAT to the possibility that it would be required to apply a policy that it may have questioned. I agree with the employers' adviser that WCAT is not the appropriate forum to resolve the worker's dispute with the board or directors' decision or the language of subsection 251(8).

The worker's argument, in the alternative, raises an interesting issue. He contends that his circumstances do not constitute a recurrence within the meaning of the policy. He has a terminal condition which involves expected deterioration, rather than deterioration occasioned as an unforeseen circumstance. His condition did not, by definition of the word, reach a plateau in the ordinary sense of the word. He submits that occupational disease compensation appears not to have been adequately considered when the Act was amended. Occupational diseases constitute special circumstances whereby claims are not reopened as a result of a recurrence, but rather claims involve an ongoing deterioration process with the only question being as follows: "At what point does the ongoing deterioration result in increased benefit entitlement?" In such circumstances, compensation remains payable under the former Act, notwithstanding the transition provisions of the amended Act, as there is no recurrence of a disability.

I find that item #1.00(4) applies to the worker's circumstances. As noted by the employers' adviser, the policy provides that a recurrence includes "…any permanent changes in the nature and degree of the worker's permanent disability." That language is broad enough to apply to a deterioration in the permanent effects of an injury or the permanent effects of an occupational disease; it is broad enough to apply to the

worker's circumstances. I do not know whether the worker's condition is terminal. Even if his condition is terminal, such a circumstance does not mean that his disability failed to plateau as of the effective date of his disability award.

In addition to that argument, I have also considered the submission to the Review Division that the expression "date of injury" in section 23.1 must be read as including the date of a recurrence of an injury with the result that, pursuant to paragraph 23.1(b)(i) of the Act, any recurrence in 2003 discovered at the worker's July 2003 follow-up testing would entitle the worker to two years of additional increased pension benefits, as he was over the age of 65 at the time.

I do not accept that interpretation. Such an interpretation would not be confined to the first recurrence after the age of 65; it would apply to each recurrence. Acceptance of such an interpretation would result in a worker being paid additional increased pension benefits at each point of deterioration of his or her permanent disability. Such an interpretation would be contrary to the intent of section 23.1, which is to limit the duration of the permanent disability benefits.

After reviewing the matter, I find that the worker is not entitled to a reassessment of his permanent partial disability award. Any deterioration in his permanent partial disability after June 30, 2002 would involve a recurrence of his disability and would be subject to the provisions of section 23.1 of the Act. Given the terms of section 23.1, he would not be entitled to any additional permanent partial disability benefits. That the worker's permanent disability may have commenced prior to June 30, 2002 does not prevent the revised provisions in the Act from being applied to his pension entitlement arising from any increase in his permanent disability subsequent to June 30, 2002.

I point out that my decision concerns only reassessment of the worker's permanent partial disability pension award. My decision does not concern the worker's entitlement to such matters as health care benefits which may be payable in connection with his permanent disability, or any increase in his permanent disability.

The correctness of the initial May 9, 2001 pension decision is not before me for decision. I question, but do not need to decide, its accuracy. I make that comment because I question whether the worker's claim satisfied the requirements of paragraph 6(1)(a) of the Act regarding claims for occupational diseases. That paragraph requires that a worker be "disabled from earning full wages" at work before compensation other than health care may be paid. In that regard, the worker did not suffer disability from his asbestos-related condition until 2000, some 11 years after he retired. I am aware that items #25.10 and #26.30 of the RSCM I and the RSCM II provide that claims for silicosis, asbestosis, or pneumoconiosis are exempt from the requirement in paragraph 6(1)(a). There is some question as to the validity of that policy as it applies to asbestosis and pneumoconiosis, and I refer to *WCAT Decisions #2004-05635*, *#2004-04458*, and *#2004-00583*.

Conclusion

The worker's appeal is denied. I confirm the review officer's October 21, 2003 decision; I find the worker is not entitled to a reassessment of his permanent partial disability pension award for his asbestos-related respiratory condition.

Reimbursement of expenses has not been requested. As no expenses are apparent, I make no order for reimbursement.

Randy Lane
Vice Chair

RL/jy